IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11709 of 2004

with

CIVIL APPLICATION No. 2854 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JUPITER PETROLEUM

Versus

HINDUSTAN PETROLEUM CORPN. LTD

Appearance:

1. Special Civil Application No. 11709 of 2004
M/S THAKKAR ASSOC. for Petitioner No. 1
MR GN SHAH for Respondent No. 1
RULE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 06/04/2005

ORAL JUDGEMENT

In this petition under Article 226 of the

Constitution of India, the petitioner has challenged the legality and validity of the order dated 1.9.2004 passed by the learned Nominee to Honourable the Chief Justice of this Court in Arbitration Petition No. 23 of 2004. A further prayer is for directing appointment of a retired High Court Judge as 'Sole Arbitrator' to decide and adjudicate upon the disputes and differences arising out of the Dealership Agreement dated 2.7.1990 and the notice dated 10th February 2004.

2. The petitioner is/was the dealer of the respondent Oil Company and was operating petrol/diesel pump. There was a Dealership Agreement executed between the parties. That a show cause notice came to be issued to the petitioner on 10th February 2004 requiring the petitioner to show cause as to why action be not taken against the petitioner for violating the conditions of the dealership agreement contained in Clauses 9, 38, 42, 45, 45(i) and 45(ii). It is the case of the petitioner that the petitioner disputed the allegations contained in the notice and denying the same simultaneously invoked Clause 66 of the Dealership Agreement relating to arbitration and requested the Oil Company to refer the disputes as mentioned in the show cause notice for his determination through the means of arbitration. It is the case of the petitioner that as by issuance of aforesaid show cause notice dispute has arisen between the company and the dealer they suggested that the dispute may be referred to any of the retired High Court Judge and the petitioner requested the respondent Oil Company to refer the dispute to an Arbitrator within a period of 30 days as contemplated under Section 11(5) of the Arbitration and Conciliation Act, 1996 {hereinafter referred to as "the Act"}. It is the case of the petitioner that as the company did not refer the dispute for arbitration the petitioner approached the Hon'ble Nominee to the Hon'ble Chief Justice of this Court by filing Arbitration Petition No. 23 of 2004 invoking provisions of Section 11(5) of the Act on 29th March 2004 and the learned Nominee issued the notice in the aforesaid application. In the meantime the respondent Company produced the communication/letter dated 1.9.2004 which showed that the Managing Director of the respondent Company nominated an employee of the respondent Company, namely one Umesh K. Vishwekar as 'Sole Arbitrator' which came to be opposed by the petitioner and inspite of such opposition as the said nomination is made the present petition on the said subject matter under Article 226 of the Constitution of India is preferred.

3. Shri Navin K. Pahwa, learned advocate appearing

on behalf of the petitioner has assailed the order passed by the learned Nominee to the Hon'ble the Chief Justice under Section 11(6) of the Act on the following grounds;

(i) As the respondent Company did not appoint any Arbitrator within the period of 30 days of the demand by the petitioner the respondent Company has lost the right to appoint an Arbitrator as per the Arbitration Agreement and therefore the learned Nominee ought not to have passed the order of appointing a person nominated by the Company as the Sole Arbitrator;

(ii) The learned Nominee has materially erred in not following the ratio laid down by the Hon'ble Supreme Court in the case of Bihar State Mineral Development Corporation and Another Vs. Encon Builders (I)(P) Ltd., reported in (2003) 7 SCC 418 and has materially erred in not appreciating the fact that by referring the dispute to the Arbitrator nominated by the Managing Director of the Corporation who is an employee of the Oil Company there will be bias and therefore considering the judgment of the Hon'ble Supreme Court in the case of Bihar State Mineral Development Corporation (supra) the learned Nominee ought not to have appointed a person as named by the Managing Director who is also the employee of the Oil Company;

(iii) The learned Nominee has already given the finding to the effect that the Arbitrator is not biased and that there is no warrant for apprehension that the Arbitrator would have any bias against the petitioner.

Therefore it is requested to allow the present Special Civil Application and to quash and set aside the order passed by the learned Nominee to the Hon'ble the Chief Justice of this Court, under Section 11(6) of the Act.

4. Relying upon the Judgment of the Hon'ble Supreme Court in the case of Bihar State Mineral Development Corporation (supra), in particular Para No. 16 thereof, Shri Pahwa, learned advocate appearing for the petitioner has submitted that in a case of similar set of circumstances where in the agreement itself it was provided that if there is any dispute between the parties to the agreement the matter will be referred to the Managing Director, the Hon'ble Supreme Court has held that he lacked jurisdiction to adjudicate the said

dispute as nobody can be a Judge in his own case. Moreover since the act of bias was referable to the Managing Director's action during execution of the agreement the Hon'ble Supreme Court has held that the question whether the contractor has entered into the contract with his eyes wide open is irrelevant. Relying upon the aforesaid Judgment of the Hon'ble Supreme Court, Shri Pahwa, the learned advocate for the petitioner, while contending that as in the present case the Sole Arbitrator is the employee of the Oil Company who is nominated by the Managing Director of the Oil Company there are all possibilities of bias and not getting full justice, has submitted that the Hon'ble Nominee to the Hon'ble the Chief Justice ought not to have appointed him as the Sole Arbitrator as the learned Nominee has not properly considered the same and therefore requested to allow the present Special Civil Application. Relying upon Section 12 of the Act it is submitted that the question with regard to independence and impartiality of the Arbitrator can be gone into and challenged by the petitioner and therefore it is requested to quash and set aside the order passed under Section 11(6) of the Act.

5. In response to the notice issued by this Court, Shri G.N. Shah, learned advocate appears on behalf of the respondent Oil Company. It is submitted that since as provided in the Dealership Agreement itself more particularly in Clause 66 thereof the petitioner has agreed for the sole arbitration of the Managing Director of the respondent-Company who was authorised to nominate an officer of the Corporation it is not open for the petitioner to challenge the same. Relying upon the Judgments of the Hon'ble Supreme Court in the case of State of Orissa & Ors. Vs. Gokul Ananda Jena, reported in (2003) 6 SCC 465; in the case of State of U.P. Vs. Johri Mal, reported in (2004) 4 SCC 714; in the case of Food Corporation of India Vs. Indian Council of Arbitration and Others, reported in AIR 2003 S.C. Page 3011; and the decision of the Full Bench of this Court in the case of New India Assurance Company Ltd., Ahmedabad, Vs. Hanjar Fibres Ltd., Surat, reported in AIR 2003 Gujarat 311, it is submitted that all the questions and objections which are raised by the petitioner in the present Special Civil Application and which were raised before the learned Nominee are required to be raised before the Arbitrator in an application under Section 16 of the Act and the petition under Article 226 is not required to be entertained against the order of the learned Nominee passed under Section 11(6) of the Act. It is submitted that the question with regard to bias can be gone into only after the decision is taken by the Sole

Arbitrator and/or in an application under Section 16 of the Act and/or thereafter at the stage of making an application under Section 34 of the Act challenging the award that may be passed by the learned Sole Arbitrator and on appreciation of evidence the same can be dealt with at that stage, i.e., at the stage of Section 34 of the Act and therefore it is requested to dismiss the present Special Civil Application. It is further submitted that as such the petitioner approached and insisted for referring the dispute to the Sole Arbitrator only at the stage of show cause notice and no action was taken by the respondent Oil Company and instead of that appointed and nominated the Sole Arbitrator. It is submitted that the question whether the dispute is referable to an arbitral Tribunal or not, the question relating to validity of constitution of such arbitral Tribunal etc., are required to be gone into by the Sole Arbitrator in an application under Section 16 of the Act and therefore also it is requested to dismiss the present Special Civil Application under Article 226 of the Constitution of India at this stage. It is further submitted that in fact the apprehension on the part of the petitioner that the learned Nominee while referring the dispute to the Sole Arbitrator has already given finding that there will be no bias is absolutely misconceived and illfounded because it is only an observation prima facie made, and at the stage of proceedings under Section 34 the same can be gone into for establishing a case of bias if any and therefore it is requested to dismiss the present Special Civil Application.

6. Heard the learned advocates for the parties. It is not in dispute that there is a Dealership Agreement between the parties and Clause No. 66 thereof provides for reference of any dispute to a Sole Arbitrator, namely to the Managing Director and the Managing Director is authorised to nominate an officer of the company as a Sole Arbitrator. The objections which are raised by the petitioner are as such required to be considered and dealt with by the Sole Arbitrator in an application under Section 16 of the Act. As held by the Hon'ble Supreme Court of India in the case of Food Corporation of India (supra), the questions regarding scope, meaning, effect, applicability of arbitration clause, legality, propriety and validity of the Constitution of Arbitral Tribunal and even if there is any objection as to the existence of an enforceable or a valid arbitration agreement are to be adjudicated by such Arbitral Tribunal and not by the High Court. It is also even held by the Hon'ble Supreme Court in the case of State of Orissa Vs. Gokulananda Jena,

reported in AIR 2003 S.C. 4027 that in view of Section 16 read with Section 12 and 13 of the Act almost all disputes which could be presently contemplated can be raised and agitated before the Arbitrator appointed by the Designated Judge under Section 11(6) of the Act, and from perusal of the said provisions it is clear that there is hardly any area of dispute which cannot be decided by the Arbitrator appointed by the Designated Judge.

6.1. The intention of the Arbitration Act is to facilitate prompt resolution of disputes by reference to arbitration. The Legislature, in its wisdom, has provided for appropriate remedies under the Act both when the plea regarding jurisdiction is accepted by the Tribunal and rejected by the Tribunal. The aforesaid aspect has also been considered by the Full Bench of this Court in the case of New India Assurance Company (supra), and after considering the judgments of the Hon'ble Supreme Court of India in the case of Konkan Railway Corporation Ltd. Vs. Rani Construction Pvt.Ltd., AIR 2002 SC 778 and Food Corporation of India vs. Joginderpal Mohinderpal, AIR 1989 SC 1263, the Full Bench of this Court has held as under;

> "Since the arbitral tribunal is competent to rule on its own jurisdiction including ruling of any objection with regard to existence or validity of the arbitration agreement, the order of the Chief Justice with regard to preliminary objection, as to whether dispute is arbitrable or not in view of passing of receipt of followed final settlement by petitioner Company under Insurance Policy and direction that the preliminary objection to be decided by the arbitral Tribunal under S. 16 without expressing any final opinion on the said question and leaving it open to the parties to raise that question before the arbitrator or arbitrators could not be said to be vulnerable or in any unjust, unreasonable, arbitrary or invalid requiring interference in exercise of constitutional writ jurisdiction. The parties aggrieved by an arbitral awards, after rejection of such plea of jurisdiction or validity or existence of the arbitration agreement can challenge the same by invocation of the provisions of S. 34 of the Act."

7. Considering the aforesaid judgments of the Hon'ble Supreme Court of India and of this Court, the questions and objections, which are raised by the petitioner, are required to be considered by the learned Arbitrator in an application under Section 16 of the Act. While considering the judgment of the Hon'ble Supreme Court delivered in the case of Bihar State Mineral Development Corporation (supra), the learned Nominee, to the Hon'ble the Chief Justice, has observed that the Hon'ble Supreme Court in the aforesaid case has in fact found that the test of bias on the part of the appellant No.2 is fully satisfied and the impugned order is unassailable and as the bias on the part of 2nd appellant goes to the root of his jurisdiction to act as an arbitrator, the entire action is a nullity, and, considering the aforesaid fact, the learned Nominee has prima facie held, more particularly considering the fact that the show cause notice dated 10th February 2004 was given by the Regional Manager, Rajkot and the Sole Arbitrator is the Deputy General Manager at Mumbai, that there is no warrant for apprehension that the Sole Arbitrator shall have any bias against the petitioner. These are all the prima facie observations made by the learned Nominee while passing the order under Section 11(6) of the Act. The question with regard to apprehended bias can be considered in an application under Section 16 of the Act and/or the question with regard to real bias can be considered in an application submitted under Section 34 of the Act after the award is declared by the Sole Arbitrator. On appreciation of evidence in the facts and circumstances of the case the same can be dealt with at the time of proceedings under Section 34 of the Act. Under the circumstances, the apprehension on the part of the petitioner is not well-founded. Even otherwise, as stated above, and considering the Judgment of the Hon'ble Supreme Court to the effect that all these questions and objections are required to be considered by the Sole Arbitrator in an application under Section 16 of the Act and which are required to be dealt with by the Sole Arbitrator in the said application under Section 16 of the Act and subsequently at the stage of Section 34 proceedings, there is no warrant for interference of this Court in the order passed under Section 11(6) of the Act by the learned Nominee to the Hon'ble the Chief Justice.

8. For the foregoing reasons, the present Special Civil Application under Article 226 of the Constitution of India is not required to be entertained. It is accordingly dismissed. Notice is discharged.

10. In view of dismissal of the main Special Civil Application, no orders on Civil Application No. 2854 of 2005.

{ M.R. Shah, J. }

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